



December 21, 2012

## H.R. 5949 – FISA Amendments Reauthorization Act

### Noteworthy

- **Background/Executive Summary:** In 2008, Congress updated the Foreign Intelligence Surveillance Act to reflect the vast changes in telecommunications technology over the prior 30 years. Those changes were made to sunset at the end of this year. The Director of National Intelligence has said reauthorizing these updates in their current form is his highest legislative priority, and the FBI Director has said these intelligence tools are “absolutely essential” to interdicting terrorist plots against the U.S. homeland. H.R. 5949 is a clean extension of the sunset to December 31, 2017.
- **Floor Situation:** Unanimous consent has been given that the Senate proceed to this bill at a time to be determined with the following amendments in order: Leahy, Merkley, Paul, and Wyden. These amendments, along with final passage, are to be subject to a 60-vote affirmative threshold.

### House Action

The House passed this bill by a vote of 301-118 on September 12, 2012.

### Overview/Background

The Foreign Intelligence Surveillance Act of 1978 (FISA) provides a statutory framework for the use of electronic surveillance and other intelligence tools in the context of the collection of foreign intelligence information. Congress in 2008 updated the statute “to reflect the enormous changes in telecommunications technology over the last 30 years,” as Senator

Rockefeller (then-Chairman of the Senate Intelligence Committee) said at the time.<sup>1</sup> Those updates were made to sunset at the end of this year, December 31, 2012.

The Director of National Intelligence testified to Congress at the beginning of this year that the “highest legislative priority” of the intelligence community this year “is reauthorization of these authorities in their current form.”<sup>2</sup> FBI Director Robert Mueller testified to the House Judiciary Committee on May 9, 2012, that the FISA updates are “absolutely essential” to stopping terrorist plots against the U.S. homeland.

H. R. 5949 is a clean extension of these updated authorities until the end of 2017.

## 2008 FISA Updates

The 2008 updates to FISA were primarily concerned with providing additional procedures for collecting foreign intelligence information from people outside the United States, with more stringent requirements if the person was a U.S. citizen.

### *FISA Section 702: electronic surveillance against non-U.S. persons*

The updates first added to FISA a new section 702, which provides certain procedures for targeting non-U.S. persons outside the United States for the purpose of acquiring through electronic surveillance foreign intelligence information without an individualized court order. In short, section 702 was designed to update the intelligence community practice of “treat[ing] non-U.S. persons located overseas like persons in the United States,” requiring an individualized FISA court order approving surveillance.<sup>3</sup>

Section 702 essentially authorizes the Director of National Intelligence and the Attorney General jointly to authorize a program of electronic surveillance and collection of stored electronic communications data directed at certain non-U.S. persons reasonably believed to be located outside the United States. This takes the procedural form of them submitting a certification and any supporting documentation to the Foreign Intelligence Surveillance Court for its review of the program’s targeting procedures and minimization procedures.

The targeting procedures are designed to ensure the acquisition targets only people outside the United States. The minimization procedures provide protections related to the acquisition, retention, and dissemination of information concerning U.S. persons not consenting to the acquisition. As the Director of National Intelligence and Attorney General have outlined, the minimization procedures “protect the identities of U.S. persons and any nonpublic information concerning them that may be incidentally acquired.”<sup>4</sup>

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<sup>1</sup> 154 Cong. Rec. S6465 (July 9, 2008).

<sup>2</sup> James Clapper, Prepared Remarks of the Director of National Intelligence before the Senate Intelligence Committee hearing re Worldwide Threat Assessment, Jan. 31, 2012, available at [http://www.dni.gov/files/documents/Newsroom/Testimonies/20120131\\_wwta\\_as\\_delivered\\_remarks.pdf](http://www.dni.gov/files/documents/Newsroom/Testimonies/20120131_wwta_as_delivered_remarks.pdf)

<sup>3</sup> Director of National Intelligence and Attorney General Background Paper on FISA Title VII, p. 2 (Feb. 8, 2012), reprinted at S. Rpt. 112-174, p. 16.

<sup>4</sup> Id.

Section 702 further provides several limitations on these targeting procedures. For example, acquisition cannot be used to intentionally target a U.S. person reasonably believed to be located outside the United States, or a person reasonably believed to be located outside the United States if the purpose is to target a particular, known person reasonably believed to be in the United States, i.e., reverse targeting.

The Court then reviews the submitted procedures for compliance with the statute and the Constitution, and issues an order approving them. As the ACLU attorney challenging this statute recently conceded to the Supreme Court, if these statutory directives resulted in procedures that produced a violation of the Fourth Amendment, “the FISA Court would presumably know that” and rule accordingly.<sup>5</sup>

#### *FISA Sections 703 & 704: electronic surveillance of U.S. persons*

Unlike section 702 dealing with non-U.S. persons, sections 703 and 704 address the targeting of U.S. persons reasonably believed to be located outside the United States. As the Congressional Research Service notes, these provisions “generally follow the same structure used by the procedures that already existed in FISA to obtain a court order authorizing electronic surveillance or physical searches of U.S. persons within the United States.”<sup>6</sup> In short, both sections require individualized court orders. Section 703 requires a greater showing to the court, as it addresses electronic surveillance acquisition performed inside the United States. Section 704 pertains to electronic surveillance acquisition done outside the United States.

#### *FISA oversight*

The FISA Amendments Act created extensive reporting requirements regarding its implementation, and there is extensive congressional oversight of the matter. For example, the Attorney General submits a semi-annual report on implementation of the Act. In the report accompanying the Senate Intelligence Committee bill, the Chairwoman said in Additional Views that the committee “has conducted robust oversight” of the Act’s surveillance authorities. Moreover, the involvement of the Foreign Intelligence Surveillance Court itself guarantees judicial review by an independent and detached neutral third-party arbiter. As the Chairwoman said, the Committee has “seen the seriousness with which the Court takes its responsibility to carefully consider Executive Branch applications for the exercise of” the Act’s surveillance authorities.

The Executive branch also conducts extensive internal oversight of the process. The operational aspects of the acquisition are subject to day-to-day management oversight by the leadership within the relevant Intelligence Community elements. The Department of Justice’s National Security Division and various offices of inspectors general have been involved in the routine review of implementation of the FAA.

Again, this bill is a clean extension of these updated authorities until the end of 2017.

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<sup>5</sup> Clapper v. Amnesty Int’l, Transcript of Oral Argument, Oct. 29, 2012, p. 32, available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-1025.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1025.pdf).

<sup>6</sup> Congressional Research Service, Reauthorization of the FISA Amendments Act, CRS Rpt. R42725, p. 9.

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## **Administration Position**

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The Obama Administration said it “strongly supports” this bill in a [Statement](#) of Administration Policy.

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## **Cost**

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The Congressional Budget Office [estimates](#) that implementing this bill would have no significant cost.

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## **Possible Amendments**

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